



STATE OF NEW JERSEY
Board of Public Utilities
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www.nj.gov/bpu/

WATER

IN THE MATTER OF THE PETITION OF NEW)	ORDER DENYING
JERSEY- AMERICAN WATER COMPANY FOR A)	INTERLOCUTORY REVIEW
DETERMINATION CONCERNING FENWICK)	
WATER TANK PURSUANT TO N.J.S.A. 40:55D-19)	BPU DOCKET NO. WO22010004
)	
)	OAL DOCKET NO. PUC 00319-22

Parties of Record:

Brian O. Lipman, Esq., Director, New Jersey Division of Rate Counsel
Niall J. O'Brien, Esquire, Archer & Greiner P.C., on behalf of New Jersey-American Water Company
Phyllis J. Kessler, Esq. and David B. Amerikaner, Esq., Duane Morris, LLP, on behalf of Paul Savas, Intervenor
Louis P. Rago, Esq., on behalf of the Borough of Bernardsville

BY THE BOARD¹:

This matter is before the New Jersey Board of Public Utilities (“Board” or “BPU”) on the December 19, 2022 request filed by the New Jersey Division of Rate Counsel (“Rate Counsel”) in the above matter seeking interlocutory review of Administrative Law Judge (“ALJ”) Tricia M. Caliguire’s December 14, 2022 Letter Order striking portions of Rate Counsel’s Expert Witness’s rebuttal testimony (“Letter Order”). For the reasons stated below, the Board denies Rate Counsel’s request for interlocutory review.

BACKGROUND

New Jersey-American Water Company (“NJAW” or “Company”) provides water service to approximately 660,000 customers and provides wastewater service to approximately 49,900 customers in portions of the following counties: Atlantic, Bergen, Burlington, Camden, Cape May, Essex, Gloucester, Hunterdon, Mercer, Middlesex, Monmouth, Morris, Ocean, Passaic, Salem,

¹ Commissioner Zenon Christodoulou recused himself and took no part in the Board’s consideration of this matter.

Somerset, Union, and Warren. NJAW's service territory includes the Borough of Bernardsville in Somerset County ("Borough").

On March 10, 2020, NJAW filed an application with the Borough of Bernardsville's Zoning Board of Adjustment ("Zoning Board") requesting conditional use approval, variances from conditional use standards, preliminary and final major site plan approval and bulk variances related to the development of a water storage tank at 426 Mendham Road, Block 5, Lot 5, in the Borough ("Proposed Water Tank"). The Zoning Board denied NJAW's application via resolution on December 17, 2021.

On January 4, 2022, NJAW filed a petition with the Board seeking a determination that the Proposed Water Tank is necessary for the service, convenience and/or welfare of the public in the Company's service territory ("Petition"). The Petition further requested that the Board issue an Order finding the zoning, site plan review, and all other Municipal Land Use Ordinances or Regulations promulgated under the auspices of Title 40 of the New Jersey Statutes and the Land Use Act of the State of New Jersey shall not apply to the Proposed Water Tank pursuant to N.J.S.A. 40:55D-19.

The Petition was subsequently transmitted to the Office of Administrative Law for hearings as a contested case and was assigned to ALJ Caliguire. ALJ Caliguire granted intervenor status to Borough resident Paul Savas ("Intervenor"). ALJ Caliguire granted participant status to Borough resident Karen Martin. By notice to the parties dated August 12, 2022, the hearings for this matter were scheduled to begin on December 12, 2022.

On December 2, 2022, the Intervenor filed a motion in limine seeking an order precluding or barring certain portions of the rebuttal testimony of Rate Counsel's witness Howard Woods ("Woods"). At a conference before the ALJ, the Intervenor initially sought either to bar certain portions of Woods' testimony concerning whether it was feasible for the Southeast Morris County Municipal Utilities Authority ("SMCMUA") to sell NJAW additional water after considering the effect of new rules issued by the New Jersey Department of Environmental Protection. Alternatively, Intervenor requested additional time to further explore Woods' past work with SMCMUA in discovery.

NJAW responded to the Intervenor's motion on December 5, 2022 arguing against the request for additional time for discovery on Woods' work with SMCMUA because of the need to quickly resolve this matter.

Rate Counsel responded to the intervenor's motion on December 9, 2022 arguing that expert witnesses can offer facts as part of their testimony and that New Jersey's Rules of Evidence Rule 702 and 703 allow for experts to base their opinions on facts that are outside the record. Additionally, Rate Counsel argued that the issue of whether SMCMUA could provide sufficient quantities of water to NJAW only became a relevant issue after the Intervenor submitted testimony raising a possibility that NJAW could obtain the needed water from them and not build the water tank. Rate Counsel further claimed that Woods' relationship with SMCMUA was properly disclosed in his resume, which was attached to his direct testimony.

On December 14, 2022, ALJ Caliguire issued a Letter Order granting the Intervenor's motion to exclude the portion of Rate Counsel's rebuttal testimony numbered (2) and titled "Source of Supply."² In the Letter Order granting Intervenor's motion to strike, ALJ Caliguire noted the purpose of discovery in administrative proceedings is to prevent surprises. The ALJ held that the reference to Woods' work with SMCMUA did not adequately explain the full scope of his work with SMCMUA or how that work experience might be relevant to the issue of whether SMCMUA could sell water to NJAW. Furthermore, the ALJ reasoned that no prejudice would inure to Rate Counsel from excluding the portion of Woods' testimony because Rate Counsel may introduce the same information regarding whether NJAW purchasing water from SMCMUA was a reasonable alternative to the Fenwick Tank project through another witness at the hearing. Moreover, the ALJ reasoned that NJAW has the burden to show that it considered alternatives to the project, not that SMCMUA had good reasons to decline to sell more water to NJAW.

On December 19, 2022, Rate Counsel filed a request for interlocutory review of ALJ Caliguire's Letter Order striking portions of Woods' rebuttal testimony. Rate Counsel explained that the issue of other sources of supply only became a factual issue in the case after the Intervenor's direct testimony related it to the second prong of the statute—whether NJAW had considered reasonable alternatives to the project that would still provide similar public benefits. Rate Counsel argued it is prejudiced if it is not permitted to rebut Intervenor's factual allegations through its own expert testimony. Rate Counsel further argued that all relevant evidence is admissible in an administrative hearing, Delguidice v. New Jersey Racing Commission, 100 N.J. 79 (1985), and that New Jersey's Rule of Evidence Rule 702 and Ryle 703 allow expert witnesses to base their opinions on facts known to the expert outside the record and based upon their expertise in their respective field.

On December 22, 2022, the Intervenor filed opposition to Rate Counsel's request.³ Intervenor claimed that: 1) Woods' rebuttal testimony was surprise fact testimony, 2) admitting the testimony violates N.J.A.C. 1:1-10.1(a), and 3) that Article VII of the New Jersey Rules of Evidence is not applicable to the dispute.

DISCUSSION AND FINDINGS

An order or ruling of an ALJ may be reviewed on an interlocutory basis by an agency head at the request of a party. N.J.A.C. 1:1-14.10(a). Any request for interlocutory review shall be made to the agency head no later than five (5) working days from the receipt of the order. N.J.A.C. 1:1-14.10(b). Under N.J.A.C. 1:14-14.4(a), the portion of the administrative code that governs interlocutory appeals to the Board, the Board shall determine whether to accept the request and conduct an interlocutory review by the later of (i) ten days after receiving the request for interlocutory review or (ii) the Board's next regularly scheduled open meeting after expiration of the 10-day period from receipt of the request for interlocutory review.

² The Intervenor's initial informal motion sought to exclude certain portions of Rate Counsel's rebuttal testimony or to alternatively adjourn the scheduled hearing dates to allow additional discovery. The ALJ denied the part of the motion requesting to adjourn the scheduled hearings and allow additional discovery verbally on the record, and prepared a letter order disposing of the remainder of Intervenor's motion. No party has sought review of the portion of the ALJ's order denying additional discovery.

³ The Company objected to the factual background section of Intervenor's opposition. Given the grounds for the Board's disposition of Rate Counsel's request for review, the Board does not consider the factual background section of Intervenor's submission.

In addition, under N.J.A.C. 1:14-14.4(b), if the Board determines to conduct an interlocutory review, it shall issue a decision, order, or other disposition of the review within 20 days of that determination. Additionally, under N.J.A.C. 1:14-14.4(c), if the Board does not issue an order within the timeframe set out in N.J.A.C. 1:14-14.4(b), the judge's ruling shall be considered conditionally affirmed. However, the time period for disposition may be extended for good cause for an additional 20 days if both the Board and the OAL Director concur. Finally, it should be noted that N.J.A.C. 1:1-14.10(i) in relevant part provides that:

any order or ruling reviewable interlocutory is subject to review by the agency head after the judge renders the initial decision in the contested case, even if an application for interlocutory review:

1. Was not made;
2. Was made but the agency head declined to review the order or ruling; or
3. Was made and not considered by the agency head within the established time frame.

Here, ALJ Caliguire's decision was issued on December 14, 2022 and Rate Counsel filed its motion on December 19, 2022, which is within the five (5) day time period set forth in N.J.A.C. 1:14-14.10(b). Moreover, the Board's next regularly scheduled Agenda meeting, following the expiration of the specified 10-day time period for reviewing the motion is January 11, 2023. As such, the Board is within the time limit set forth in N.J.A.C. 1:14-14(a) to consider Rate Counsel's request for interlocutory review.

The legal standard for accepting a matter for interlocutory review is stated in In re Uniform Administrative Procedure Rules, 90 N.J. 85 (1982). In that case, the New Jersey Supreme Court concluded that an agency has the right to review ALJ orders on an interlocutory basis "to determine whether they are reasonably likely to interfere with the decisional process or have a substantial effect upon the ultimate outcome of the proceeding." Id. at 97-98. The Court held that the agency head has broad discretion to determine which ALJ orders are subject to review on an interlocutory basis. However, the Court noted that the power of the agency head to review ALJ orders on an interlocutory basis is not itself totally unlimited, and that interlocutory review of ALJ orders should be exercised sparingly. Id. at 100. In this regard, the Court noted:

In general, interlocutory review by courts is rarely granted because of the strong policy against piecemeal adjudications. See Hudson v. Hudson, 36 N.J. 549 (1962); Pennsylvania Railroad, 20 N.J. 398. Considerations of efficiency and economy also have pertinency in the field of administrative law. See Hackensack v. Winner, 82 N.J. at 31-33; Hinfey v. Matawan Reg. Bd. of Ed., 77 N.J. 514 (1978). See infra at 102, n.6. Our State has long favored uninterrupted proceedings at the trial level, with a single and complete review, so as to avoid the possible inconvenience, expense and delay of a fragmented adjudication. Thus, "leave is granted only in the exceptional case where, on a balance of interests, justice suggests the need for review of the interlocutory order in advance of final judgment." Sullivan, "Interlocutory Appeals," 92 N.J.L.J. 162 (1969). These same principles should apply to an administrative

tribunal.

[90 N.J. at 100].

The Court held that interlocutory review may be granted “only in the interest of justice or for good cause shown.” Ibid. In defining “good cause”, the court stated:

In the administrative arena, good cause will exist whenever, in the sound discretion of the agency head, there is a likelihood that such an interlocutory order will have an impact upon the status of the parties, the number and nature of claims or defenses, the identity and scope of issues, the presentation of evidence, the decisional process, or the outcome of the case.

[Ibid.]

As set forth above, the decision to grant interlocutory review is committed to the sound discretion of the Board, and may be granted in the interest of justice. Having reviewed Rate Counsel’s request, the Intervenor’s response, and ALJ Caliguire’s Letter Order, the Board is not persuaded that it is appropriate to grant the interlocutory review.

The Board deems it unnecessary to review the merits of the ALJ’s rulings at this stage of the proceedings. The Board notes that the excluded portion of testimony was merely part of Rate Counsel’s rebuttal testimony; none of Rate Counsel’s direct testimony, and the majority of its rebuttal testimony was admitted into evidence. Additionally, all of the Company’s testimony on reasonable alternatives to the project was admitted into evidence, and the ALJ noted that no prejudice would inure to Rate Counsel as the excluded information was admissible via other sources. With evidentiary hearings completed at the OAL, and the parties expected to serve summation briefs articulating their factual and legal positions on the petition, the Board declines to interfere in this case at this time. The Board notes that all orders of an ALJ are reviewable by the Board after the issuance of an initial decision under the Administrative Procedure Act. See In re Appeal of Certain Sections of Uniform Administrative Procedure Rules, 90 N.J. 85, 96 (1982). Additionally, because Rate Counsel elected to pre-file its rebuttal testimony, the record is preserved for the Board to review any evidence ruling which may be presented by the parties by way of exception to the ALJ’s initial decision. The Board believes that the rulings made during the conduct of the proceeding by ALJ Caliguire who, consistent with N.J.A.C. 1:1-14.6, has the power to develop the record and render a decision dispositive of the issues before the OAL, should remain undisturbed at this juncture.

Accordingly, the Board **HEREBY DENIES** Rate Counsel’s request for interlocutory review of ALJ Caliguire’s Letter Order issued on December 14, 2022.

This Order is effective on January 18, 2023.

DATED: January 11, 2023

BOARD OF PUBLIC UTILITIES
BY:



JOSEPH L. FIORDALISO
PRESIDENT



MARY-ANNA HOLDEN
COMMISSIONER



DIANNE SOLOMON
COMMISSIONER



ROBERT M. GORDON
COMMISSIONER

ATTEST: 

CARMEN D. DIAZ
ACTING SECRETARY

I HEREBY CERTIFY that the within
document is a true copy of the original
in the files of the Board of Public Utilities.

IN THE MATTER OF THE PETITION OF NEW JERSEY- AMERICAN WATER COMPANY FOR
A DETERMINATION CONCERNING FENWICK WATER TANK PURSUANT TO N.J.S.A.
40:55D-19

BPU DOCKET NO. WO22010004 and
OAL DOCKET NO. PUC 00319-22
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